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M E M O R A N D U M

PRIVILEGED AND CONFIDENTIAL

TO: Nancy Floreen, Chair
Transportation and Environment Committee

VIA: Marc P. Hansen
Deputy County Attorney

FROM: Edward B. Lattner
Associate County Attorney

DATE: March 27, 2006

RE: **Expedited Bill 38-05**
State Preemption of Proposed Sand Mound Moratorium

A county law is “preempted by conflict” if it prohibits that which the state permits. State law permits the use of sand mounds as a type of on-site sewage disposal system, but Bill 38-05 would impose a temporary moratorium on their use, with some exceptions. I believe that Bill 38-05 is preempted by conflict because it would prohibit something permitted by state law—the use of sand mounds.

Background

Sand mounds are a type of on-site sewage disposal system permitted under state law. The State amended its sewage regulations in 1986 to include sand mounds systems as a type of “conventional on-site sewage disposal system,” along with traditional trench systems. COMAR 24.04.02.01(B)(11).¹ The 1986 amendment also added new design and construction minimum standards for sand mounds. COMAR 26.04.02.05(Q).² According to the Department of

¹ The amendment was initially promulgated as an emergency measure effective May 6, 1986, 13:11 Md. R. 1267-1270, but was later made permanent, effective November 3, 1986. 13:22 Md. R. 2398-2399.

² Where site conditions would normally preclude use of a sand mound as a conventional sewage disposal system, a land owner might still be able to use a sand mound as an “innovative or alternative” sewage disposal system under the state’s “Innovative and Alternative Septic System Grant Program.” Md. Code Ann., Envir. §§ 9-1401 to 9-1406.

Permitting Services, the County approved sand mounds for use on a few established properties in the late 1980's. In 1994, with Executive Regulation 28-93AM, the County formally adopted sand mound requirements.

A person cannot construct or alter an on-site sewage disposal system without first receiving a permit from an "Approving Authority." COMAR 26.04.02.02(M).³ An agreement between the state and the county designates the Department of Permitting Services Director as the "Approving Authority" in Montgomery County and delegates to the county implementation of state regulations, including COMAR 26.04.02 ("Sewage Disposal and Certain Water Systems for Homes and Other Establishments in the Counties of Maryland Where a Public Sewage Systems is Not Available"). The Approving Authority must issue a permit for an on-site sewage disposal system "if it determines that the site and proposed design can safely dispose of sewage and conform with applicable laws and regulations." COMAR 26.04.02.02(L).⁴

The state regulations give the Approving Authority some latitude to impose additional restrictions for on-site sewage disposal systems generally. For example, COMAR 26.04.02.03(D) provides that "an on-site sewage disposal system may not serve more than one building unless specifically authorized by the Approving Authority." COMAR 26.04.02.05(F) states that "septic tanks shall be made of materials and constructed in a manner acceptable to the Approving Authority." And COMAR 26.04.02.05(N) provides that "greater absorption area than provided for in this regulation may be required by the Approving Authority based on local conditions and experience."

But, with regard to sand mound systems, the state regulations expressly allow the Approving Authority to increase only the minimum depth for ground water or permeable material/fractured bedrock. COMAR 26.04.02.05(Q)(2).⁵ The state regulations do not allow the Approving Authority to vary any of the other sand mound minimum standards.

The delegation agreement between the state and the county also contemplates some

³ In addition, a person cannot construct or alter any residence or commercial establishment served or to be served by an on-site sewage disposal system, and a county may not issue a building permit for the desired new construction or alteration, until the Approving Authority has issued an on-site sewage disposal permit or certified that the existing on-site sewage disposal system is adequate. COMAR 26.04.02.02(D).

⁴ Elsewhere the state regulations appear to give the Approving Authority a bit more discretion. *See, e.g.*, COMAR 26.04.02.04(E) ("The Approving Authority may not permit any on-site disposal systems to be installed when, in his opinion, it may pollute well water supplies, water supply reservoirs, shellfish growing waters, bathing beaches, lakes and tidewater areas") and COMAR 26.04.02.04(H) ("If, in the opinion of the Approving Authority, a safe and adequate water supply is not available to the lot, an on-site sewage disposal permit shall be denied").

⁵ The state authorized the Approving Authority to amend this one aspect of sand mound design criteria in 1992. 19:8 Md. R. 806.

measure of local regulation. Section II(A) of the agreement states:

II. Local Implementation Strategies

A. Relationship of State Law to Local Ordinances.

Where State or local permits are denied based on requirements of local ordinances or regulations, denial letters should accurately reflect that the denial is based upon failure to meet specific local criteria. The [state] and the Attorney General, in hearing cases on appeal, cannot support local denials involving State regulations, which go beyond the intent of State law, and regulation. Such cases would have to be handled at the local level. In areas where State law preempts local control (*i.e.*, well construction), the Montgomery County Department of Permitting Services may not enforce more stringent requirements.

Recognizing this dichotomy of local and state regulation, § XVI of the county's regulation provides that a person aggrieved by a final decision of the Approving Authority with respect to county requirements may appeal to the Board of Appeals, while a person aggrieved by a final decision of the Approving Authority with respect to state requirements may appeal to the State Department of Environment.

Analysis

State law may preempt local law in one of three ways: (1) preemption by conflict;⁶ (2) express preemption; or (3) implied preemption.⁷ A local law is preempted by conflict when it either prohibits an act that under state law is permitted, or it permits an act that under state law is prohibited. "We have referred to this type of conflict preemption as 'prohibit-permit' conflict." *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 513, 850 A.2d 1169, 1177 (2004). But not all conflicts fit squarely within the "prohibit-permit" category. A local law may conflict with a state public general law in other respects and will, therefore, be preempted.⁸

⁶ Md. Const. art. XI-A, § 3 provides that a local government law which conflicts with a public general law enacted by the General Assembly is preempted and thus is invalid.

⁷ Because of my conclusion that Bill 38-05 is invalid because it conflicts with state law, I have not examined whether state law has impliedly preempted the field of sewage disposal generally, or the use of sand mounds as an on-site sewage disposal system. *See, e.g., Talbot County v. Skipper*, 329 Md. 481, 620 A.2d 880 (1993) where the court concluded that state law impliedly preempted a county law requiring a land owner to record certain information in the county land records before applying sewage sludge to his land in accordance with a state permit. The court found that the comprehensiveness of the state law manifested an intent to generally preempt the field of regulating sewage sludge utilization. The fact that state law expressly authorized local governments to act in certain circumstances, bolstered the court's conclusion that "where the state statute had not authorized local government involvement, the Legislature likely contemplated that the regulation would be exclusively at the state level." *Id.* at 492, 620 A.2d at 885.

⁸ *See, e.g., Montgomery County v. Board of Elections*, 311 Md. 512, 536 A.2d 641 (1988) (state law and

Maryland courts have stricken local laws when they conflicted with state law, either by permitting that which the state prohibited, *Levering v. Williams*, 134 Md. 48, 106 A. 176 (1919) (the public general law prohibited all work on Sunday, while the local ordinance allowed professional athletes to play sports on that day; the court invalidated the local law because it permitted conduct that the public general law prohibited), or by prohibiting that which the state law permitted, *Heubeck v. City of Baltimore*, 205 Md. 203, 107 A.2d 99 (1954) (a Baltimore City law prohibited landlords from evicting tenants after their leases expired, under certain circumstances, but a public general law provided for the eviction of those tenants; the court invalidated the local law because it prohibited conduct that the public general law permitted). More recently, in *County Council v. Investors Funding*, 270 Md. 403, 312 A.2d 225 (1973), the Maryland Court of Appeals struck down a portion of Montgomery County's landlord tenant law that prohibited a landlord from seeking to enforce the landlord's right of repossession if the action was taken in retaliation for the tenant filing a complaint with the county's landlord tenant commission. The court concluded that this provision of the county's landlord tenant law conflicted with the state law, which allowed a landlord to seek repossession without exception. In that case, the court relied on a previous decision which held that state law allows a landlord to seek repossession without exception.

The "prohibit-permit" conflict in this case most closely resembles the situation presented in *Forest Heights v. Tillie Frank*, 291 Md. 331, 435 A.2d 425 (1981). In that case, the Maryland Court of Appeals struck down an ordinance of the Town of Forest Heights because it conflicted with a statute of Prince George's County, a home-rule, charter county. Prince George's County issued licenses to fortune tellers to carry on their business at specific locations within the County, including locations within incorporated municipalities. But Forest Heights, an incorporated municipality located in Prince George's County, prohibited fortune telling within its municipal limits. Forest Heights argued that its law was merely supplemental to the county law, relying upon a prior court decision upholding a Baltimore City law establishing a certain minimum wage for tavern employees in the face of a state law that exempted those employees from the state's minimum wage.⁹ The court disagreed, writing "there is simply no way that the municipal ordinances prohibiting the practice of fortune telling can be considered 'supplemental' to the County's authorization to engage in the fortune telling business. *Id.* at 338-39, 435 A.2d 429-

local law provided two different and irreconcilable methods for appointing the same public officials); *East v. Gilchrist*, 296 Md. 368, 463 A.2d 285 (1983) (holding that a county charter amendment that prohibited the expenditure of county money for the operation of a landfill in a residential area was in conflict with a state general law that required counties to raise the necessary funds to operate a landfill once a site within the locality has been chosen by the state); and *Montgomery County Bd. of Realtors v. Montgomery County*, 287 Md. 101, 411 A.2d 97 (1980) (local and state law provided conflicting methods for assessing and taxing property).

⁹ *Baltimore v. Sitnick & Firey*, 254 Md. 303, 255 A.2d 376 (1969).

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In this case, as in *Tillie Frank*, the local law would seek to prohibit that which is permitted by the state—the use of sand mounds as an on-site sewage disposal system. The prohibition may be temporary, and it may even allow some exceptions, but it will still conflict with state law. The sand mound construction and design criteria are expressed as minimum standards,¹¹ and in some instances a local Approving Authority may increase those minimum standards, but a local Approving Authority cannot entirely foreclose the sand mound option.

Conclusion

The moratorium on sand mounds envisioned by Bill 38-05 is invalid because it conflicts with state law, which expressly permits the use of sand mounds as an on-site sewage disposal system.

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cc: Mike Faden, Senior Legislative Counsel
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Jay Beatty, Manager, Well and Septic Section, Department of Permitting Services
Jeremy Criss, Chief, Agricultural Services Division, Department Economic Development

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¹⁰ The General Assembly responded to *Tillie Frank* by enacting Md. An.. Code art. 23A, § 2B, providing that county legislation does not apply to a municipality except under certain circumstances.

¹¹ See, e.g., COMAR 26.03.01.05(C).